

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAMELA BAUMAN,

Plaintiff,

v.

DECISION
and
ORDER

2810026 CANADA LIMITED,
2810034 CANADA LIMITED,
FREDERICK GROUP INC., and
AMARJIT SINGH,

15-CV-00374A(F)

Defendants.

APPEARANCES:

DAVID W. POLAK, ESQ.
Attorney for Plaintiff
3686 Seneca Street
West Seneca, New York 14224

WILSON ELSEER MOSKOWITZ EDELMAN & DICKER LLP
Attorneys for Defendants
BEATA SHAPIRO, of Counsel
260 Franklin Street
14th Floor
Boston, Massachusetts 02110
and
BRIAN DEL GATTO, of Counsel
1133 Westchester Avenue
White Plains, New York 10604

JURISDICTION

On August 10, 2015, this case was referred to the undersigned by Honorable Richard J. Arcara for all pretrial matters. The matter is presently before the court on Defendants' motions to enforce sanctions, filed July 31, 2017 (Dkt. 67), and to strike, filed August 31, 2017 (Dkt. 70).

BACKGROUND

In Decisions and Orders filed in this action on April 12, 2017 (Dkt. 61) (“first fee award”), and on May 17, 2017, in both this action (Dkt. 65), and in a related action (“the related action”), 13-CV-00901A(F) (Dkt. 83) (“second fee award”), the undersigned awarded Defendants a total of \$ 14,177.50 in attorneys’ fees Defendants incurred in connection with Defendants’ earlier motions to compel discovery (Dkts. 17 and 30 in this action; Dkt. 46 in related action) (“motions to compel”), filed in both the instant action and in the related action. The first fee award was to be paid by May 12, 2017, and the second fee award was to be paid by June 16, 2017. See Dkt. 61 at 5; Dkt. 65 at 3. On December 16, 2016, Defendants moved to dismiss the instant action as a further sanction because Plaintiffs had yet to comply with the court-ordered discovery (Dkt. 49).

On July 31, 2017, Defendants filed the instant motion seeking to enforce the sanctions (Dkt. 67) (“motion to enforce”), attaching in support the Affidavit of Beata Shapiro, Esq. (Dkt. 67-1) (“First Shapiro Affidavit”). In support of the motion to enforce, Defendants argue Plaintiffs have yet to pay the attorneys’ fees awarded by the first and second fee awards despite Defendants, “in good faith, giving Plaintiffs an extra two months to pay the first fee award and an extra month to pay the second fee award. First Shapiro Affidavit ¶¶ 6. By Text Order entered August 2, 2017 (Dkt. 68), responses to the motion to enforce were to be filed by August 7, 2017, with any replies filed by August 10, 2017.

In opposition to the motion to enforce, Plaintiffs filed on August 25, 2017, the Affirmation of David W. Polak, Esq. (Dkt. 69) (“Polack Affirmation”), attaching exhibits A and B (Dkts. 69-1 and 69-2), explaining that Plaintiffs had yet to pay the attorneys’ fees

because the parties had been engaged in settlement discussions, with Defendants having made a formal settlement offer which included a monetary amount and Defendants' agreeing to waive the awarded attorneys' fees. Polack Affirmation ¶¶ 2-3. Plaintiffs further asserts they did not remit the awarded attorneys' fees to Defendants because the settlement discussions continued until August 11, 2017, at which time Polak requested Ms. Shapiro consent to an extension of time for Plaintiffs to submit a response to the motion to enforce or to withdraw said motion because the attorneys' fees were being paid. *Id.* ¶¶ 12-17. Plaintiffs further maintain the attorneys' fees have since been paid such that the motion to enforce is now moot. *Id.* ¶¶ 18-19 and Exh. B (copies of Polak's checks Nos. 9857 and 9858 made payable to Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, dated August 15, 2017, in the amounts of the awarded attorneys' fees).

On August 31, 2017, Defendants filed in further support of the motion to enforce a motion to strike the Polak Affirmation (Dkt. 70) ("motion to strike"), attaching the Affirmation of Beata Shapiro, Esq. (Dkt. 70-1) ("Second Shapiro Affirmation"), and exhibit A (Dkt. 70-2). Defendants particularly argue in support of striking the Polak Affirmation that it was filed more than two weeks after the August 7, 2017 response deadline, Second Shapiro Affirmation ¶¶ 3-4, and that Plaintiffs' assertions that payment of the awarded attorneys' fees had been made was false, a fact that is corroborated by Polak's letter enclosing the checks to Shapiro dated August 25, 2017, mailed August 26, 2017, and not received by Shapiro until August 29, 2017. *Id.* ¶¶ 6-9. Defendants takes further issue with Polak indicating on both checks that the funds were "paid under

protest,” which notations Defendants maintain prevent the checks from being deposited.
Id. ¶¶ 10-11 and Exh. A.

Insofar as Defendants seek a court order enforcing the awarded attorneys’ fees, Plaintiffs’ subsequent payment of such fees, even belatedly, has rendered the motion moot and the motion should be dismissed as such. With regard to Defendants’ assertion in support of the motion to strike that Polak misrepresented payment of the awarded attorney’s fees had been made, as with the motion to enforce, the belated payment of the fees renders the motion moot. Although Defendants maintain Polak’s noting on the “memo line” of both checks that the funds were “paid under protest” prevents the checks from being deposited, no case law or statute supporting this argument is referenced by Defendants, nor has the court’s research revealed any such law. Moreover, because Defendants do not assert that Defendants were unable, based on the notations, to deposit the checks, Defendants’ argument on this point is premature, requiring the motion to strike also be dismissed as premature.

CONCLUSION

Based on the foregoing, Defendants’ motions to enforce sanctions (Dkt. 67), is DISMISSED as moot; Defendants’ motion to strike (Dkt. 70), is DISMISSED as moot and as premature.

SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: October 3, 2017
 Buffalo, New York